United States
Circuit Court of Appeals
For the Ninth Circuit

OREGON - WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation, Plaintiff in Error, vs. PRESTON ROYER, Defendant in Error.	No. 3203
OREGON - WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation, Plaintiff in Error, vs. W. J. WASSON and MABEL WASSON, Defendants in Error.	No. 3204

Reply Brief of Plaintiff in Error

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Reply Brief of Plaintiff in Error

The brief of the defendants in error, who are hereinafter referred to as plaintiffs, proceeds in the main as an answer to the one filed by us, and in this reply we will endeavor to avoid a repetition of contentions made in our opening brief.

CASES CITED BY PLAINTIFFS IN SUPPORT OF THEIR CONTENTION THAT SPRING CREEK IS A NATURAL WATER COURSE.

These cases are collected under the second division of counsel's Points and Authorities, and embraced under sub-heads a, b and c. These cases are so numerous that a dicussion of each would not be justified, indeed we feel like apologizing for the excessive number of citations on the same subject assembled in our own brief. We all appreciate that each case depends upon its own facts, and it is extremely difficult to formulate a definition or a number of definitions which will cover and dispose of every conceivable case. The fallacy of attempting to do this is illustrated when we turn to the citations of counsel under Subdivision II, and note what a large percentage of them discuss cases wherein a water course is accepted as a fact, or wherein there could, under the facts stated, be no serious contention urged against the proposition that a natural water course was involved.

Let us refer to all of the Washington cases cited by counsel under heading II, in support of his contention that Spring Creek is a natural water course.

Dahlgren v. C. M. & Puget Sound R. R. Co., 85 Wash. 395-405.

We quote from the opinion in this case, Page 405:

> "The description is that of a natural and regular water course, rather than that of a mere casual overflow. * * * The testimony showed a stream flowing in a well defined channel, continuous for some nine months of the year, and that it was this particular channel that the appellant closed, to the injury of the respondents."

Miller v. Eastern R. R. & Lbr. Co., 84 Wash. 31.

In this case it appears that there was so much water and constant flow that the stream had formed more or

less of a marsh in spreading out over the land, and the defendant was proceeding to avail itself of the waters by constructing a mill pond. The contention in that case that the waters were surface waters, is disposed of as follows:

> "Nor can it be said that the waters of which respondent complains are surface waters. Surface waters which may become vagrant and subject to outlawry are waters accumulating and spreading in consequence of heavy rains and storms. Cass v. Dicks, 14 Wash. 75, 44 Pac. 113, 53 Am. St. 859; 40 Cyc. 639.
>
> " 'Surface' water may be defined as water on the surface of the ground, the course of which is so temporary or limited as not to be able to maintain for any considerable time a stream or body of water having a well defined and substantial existence." 1 Kinney, Irrigation & Water Rights, Sec. 318.

We call this Court's attention, in passing, that the law with respect to surface waters in the State of Washington was the same in 1915, when this decision in the Miller case was rendered, as announced by the Washington Court in its leading case of *Cass v. Dicks,* 14 Wash. 75.

Harvey v. Northern Pacific Ry., 63 Wash. 669.

By this case a landowner was located in a triangle formed by a crossing of the Great Northern and Northern Pacific railways. The lands involved, and a large area immediately to the south of them, were subject to overflow from the waters of the Snohomish River. These waters had passed around and upon some of the lands of the plaintiff without interference by the Northern Pacific's construction and operation, because its

railroad was supported over these lowlands on trestles, until the Northern Pacific filled same except for a small space immediately south of its crossing with the Great Northern, and in this open space the overflow waters, running with the current of the river, surged through and upon the lands of the plaintiff, causing substantial damage. The Court found that these overflow waters were surface waters, and that on the authority of this same leading case of *Cass v. Dicks,* recovery could not be sustained.

We find in the authorities cited by counsel under this Subdivision II, a number from semi-arid states. Naturally in these jurisdictions the people want to think they have water courses, whether they do or not, and if physical conditions are such that a water course could be established upon their maps, or found by their courts or juries by the application of a little imagination, the conceived water course would become an established fact, if judicial precedent could make it such.

Illustrative of these cases is *Jaquez Ditch Co. v. Garcia* (New Mexico), 124 Pac. 891, wherein we find a state of facts reported, not substantially different from those in the leading case of Walker v. New Mexico & S. P. R. R. Co., 165 U. S. 593. We leave to the Court to determine whether the New Mexico court has succeeded in distinguishing the Garcia case from the Walker case. The case was reversed because of alleged error of the trial court in its definition of a natural water course, and while the facts are not sufficiently stated to determine whether a natural water course was involved, yet from the definitions assembled in the opinion it appears that in each and all of the instances cited there is presented not only the arroyo, the defined channel, the gully, the ditch, the banks, the gorge, or the

ravine, but we also fined a flow of water during some period or season *of each year.* In other words, this case is *not* authority for the contention that onrushing waters originating with a cloud-burst, or suddenly produced by the influence of a Chinook wind upon mountains of snow, will turn the physical conditions described into natural water courses if the depressions, gorges, etc., are parched or dry from one season into another, and one year into another.

THIS IS NOT A CASE WHEREIN THE DEFENDANT HAS CONCENTRATED SURFACE WATER AT ONE POINT AND DISCHARGED IT IN A DESTRUCTIVE VOLUME UPON THE LANDS OF ANOTHER, WHERE SUCH WATERS ARE NOT WONT TO FLOW.

Under Subdivision III of their brief, plaintiffs have collected a considerable number of cases which deal with surface waters, and which present a contention in line with the theory advanced in their complaint, but in entire variance with the theory upon which the case was tried, over the objection of defendants' counsel. A casual reading of these cases might lead to the hasty conclusion that they are in conflict or tend to modify the doctrine announced in *Cass v. Dicks,* 14 Wash. 75 and in *Walker v. New Mexico, etc., R. R. Co.,* 165 U. S. 593, but as we analyze them we find that they are as remote from application to the facts presented in this case, as are the authorities cited by counsel under his Subdivision II, some of which we have discussed above.

Take the first case cited,

Peters v. Lewis, 28 Wash. 366.

It appears from the opinion in this case that the defendant owned improved property in Seattle, and that the water from the roofs of the buildings was carried by gutters onto adjoining premises. Clearly surface water was involved, but the defendant owner diverted same to premises where they *were not wont to flow*. The case is analogous to one where a property owner might cut down a natural barrier and thereby divert surface water from his premises onto lands that would not, under the conditions established by nature, be reached or affected by such surface water at all. The distinction as made in this very case of Peters v. Lewis is made by the Supreme Court of Washington in *Harvey v. Northern Pacific R. R.,* 63 Wash. 669-676. And the second case of *Noyes v. Cosselman,* 29 Wash. 635, cited by counsel, is, we think, far afield from this discussion, it appearing in that case that the defendant owning land in which there was a natural depression known as Long Lake, proceeded to cut through natural barriers and drain this water in a course where it was not wont to flow, and thereby shifted it upon the lands of the plaintiff where it did not belong. The Court, in the very opinion in question, refers to the decision of *Cass v. Dicks,* reaffirms it, and says (Page 642):

> "When the waters are confined by natural barriers so that the same do not run from such confinement naturally the appellant may not construct a ditch on his own land so as to cast the waters which do not naturally pass therefrom, onto his neighbor, to the material injury of such neighbor."

This Noyes case is also well distinguished by the Supreme Court of the State of Washington in the Harvey case, 63 Wash. 676.

Sullivan v. Johnson, 30 Wash. 72.

This is a case wherein the defendant owned low, marshy unimproved land surrounded by natural barriers which prevented it from draining upon the land of plaintiff. The defendant proceeded to cut a ditch through these natural barriers for the purpose of draining his land onto that of his neighbor. The Court disposed of the case upon the authority of the Noyes decision, and said (Page 73):

> "It was there held that where surface waters are confined by natural barriers so that the same do not run from such confinement *naturally,* the upper proprietor may not construct a ditch so as to cast such waters upon his neighbor, to the material injury of such neighbor."

Holloway v. Geck, 92 Wash. 153.

This is also a case wherein surface water was diverted from its natural flow. The quotation from the opinion indicates how entirely dissimilar the case is presented than in the one here under consideration.

> "When the defendants constructed their ditch from the center marsh, they followed the natural course of drainage as far as the center of Adams' forty, and there turned the ditch directly west, casting the water against the lands of the plaintiffs at a point some 500 feet south of where such waters would naturally drain."

The Court classified this Holloway case with the

Peters, the Noyes, and the Sullivan cases, in all of which surface water was drained away from its natural course.

Trigg v. Timmerman, 90 Wash. 678.

This is the next case cited, and illustrates the distinction we have been endeavoring to make. In this Trigg case the plaintiff proceeded to drain his wet, marshy land onto his neighbor, but he directed the flow of the water in its natural drainage by constructing ditches and apparently somewhat confining it, and the Court sustained him in doing so, upon the ground that he had removed no natural barrier. 19 L. R. A. (n. s.) 167 is quoted to the effect that

> "It is established by the great weight of authority that the flow of surface water along such depressions or drainways may be hastened and incidentally increased by artificial means so long as the water is *not diverted from its natural flow.*"

The doctrine announced by the Washington Court in the case of *Cass v. Dicks,* supra, has been approved and reiterated repeatedly and as late as February, 1916, in *Bonthuis v. Great Northern Railroad,* 89 Wash. 442, and we submit that it should control and dispose of this case in favor of the defendant. If there could be any question as to the attitude of the Washington Court, to our minds it is set at rest by the opinion in this case of *Trigg v. Timmerman,* supra, wherein the rule announced by the Supreme Court of Wisconsin with respect to surface waters, is cited with approval. (Page 682.) In this connection we would cite from the Supreme Court of Wisconsin the opinion in *Johnson v. Chicago, St. Paul, M. & O. R. Co.,* 80 Wis. 641, 14 L. R. A. 495, 27 Am. St. Rep. 76, 50 N. W. 771, from which we quote:

"The true rule in respect to surface waters, as gathered from the cases, is that 'the owner of an estate, for the purpose of securing or protecting its reasonable use and enjoyment, may obstruct or divert surface waters thereon, and which have come down from higher levels, by embankments, ditches, drains, and culverts, and other constructions; and, in doing so, may lawfully hinder the natural flow of such waters and turn the same back upon, or off, onto, or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion.' * * * One proprietor may turn and divert surface water from his own land onto the land of another, and such other proprietor may turn and divert the same waters onto the land of his adjacent neighbor, and so on. Each proprietor may thus pass on surface water, and there is no remedy except in doing so. The cases sanctioning this doctrine are too numerous to be cited."

Rohsnagel v. Northern Pacific R. Co., 69 Wash. 243.

This presents a case wherein overflow waters of the Snohomish River were involved. It seems that the water at the point in question runs north and south. Parallel with it and on its west bank the railroad was constructed. Immediately west of the railroad, Rohsnagel's premises are located. The river runs out of its banks in freshet seasons, and the railroad company proceeded to fill its roadbed between the premises of the plaintiff, and the river, with solid material, causing the water in the river, in ordinary floods, to rise from two to three feet higher on the easterly side of the railroad grade, than on the side where plaintiff's property was located. In November, 1906, the railroad embankment washed out at a

point opposite plaintiff's land and buildings, and the railroad company proceeded to construct a culvert about 50 feet in width immediately opposite the buildings of the plaintiff, through which culvert the flood waters of the river rushed with great current on plaintiff's land, and with great resulting damage to his premises. The Court permitted a recovery, stating that the railroad company "has not raised its own premises for the sole purpose of diking against and preventing the flow of surface water thereon, but has also created a new, unnatural, and destructive current through its embankment."

Wood v. Tacoma, 66 Wash. 270.

This, to our mind, is an extreme case, but it stands unchallenged as the law in the State of Washington, and why it should be cited as an authority in support of plaintiffs' contention in this case, we are at a loss to understand. If we read the case correctly, the City of Tacoma impounded surface water into a sewer and discharged it through a manhole onto lots owned by the plaintiff. It is true that the water was carried in the direction of its natural drainage, but it would seem to us to be so collected and cast upon the plaintiff's lands as to have warranted relief. The Court, however, (Page 270) says:

> "But *even if there was an increase in the amount of water, it has been held not to create a liability unless the water be cast in a concentrated and destructive body upon the land.*"

The Arizona case of Kroeger v. Twin Butte R. Co., 127 Pac. 735, is another case wherein surface water is accumulated, diverted from its natural course, and cast upon premises which it would not

ordinarily reach but for the action of the defendant complained of, and further discussion of the case would, therefore, seem unnecessary.

Keifer v. Schambaugh (Nebr.), 157 N. W. 634.

The facts in this case impress us that it is not properly classified under the discussion of surface water. It appears to involve the question as to whether a property owner was warranted in constructing a dam across a natural water course, diverting the water out of its natural channel onto the lands of another, the defendant in the case claiming and pleading an alleged oral agreement with the plaintiff under which, as he claimed, he had a right to so divert the waters in question.

The last case cited by counsel under this Subdivision, *Gulf Sea & S. F. R. Co. v. Richardson,* 141 Pac. 1107, is not an authority for either side in this case. It is admitted that the common law rule with respect to surface waters obtains in the State of Washington with full force and effect, and it is stated in this Oklahoma decision that the common law rule in Oklahoma has been restricted and modified. A further discussion of the case would therefore seem unnecessary.

THE COMPLAINT AND TESTIMONY BRIEFLY SUMMARIZED.

The complaints in these cases are substantially the same. We will refer to the record in the Royer case, wherein it appears (Page 4) that the railroad company constructed its grade across Section 29, in Township 9 North of Range 25 E. W. M. in a general easterly direction; that upon crossing Spring Creek, so-called, it made a fill or embankment for a distance of

some 700 feet, establishing its grade 5 feet above the actual surface of the ground at the crossing in question, and proceeded easterly with the grade gradually decreasing in height until it reached surface grade in about 700 feet. To the north of the railroad it appears (page 3) that there are mountains or hills known as the Rattlesnake Hills, and in these hills is a *"valley"* or *"channel"* comprising some twenty thousand acres, an average of about ten miles in width. The gorge known as Spring Creek is alleged to have its source at the top of the Rattlesnake Hills some eighteen or twenty miles away, and it is alleged in substance that it proceeds in a southeasterly direction through this "channel" to the Yakima River. It is charged that in its construction the defendant railroad company placed a drain pipe in Spring Creek, 48 inches in diameter, under its grade, and that during certain seasons of the year, caused by the melting of snow, a large volume of water flows down, and is carried off by the "channel" of Spring Creek, and the contention is made that this 48 inch drain being insufficient to accommodate the waters of the so-called Spring Creek, same were backed up by the railroad fill and broke *over* the fill or embankment onto the lower lands of the plaintiffs, etc.

The witness, Heiberling, states that this creek, so-called, is in a canyon until a short distance from the O.-W. R. & N. right of way, where the ground spreads out flat. The plaintiff, Royer, testified (Page 24) that the water coming down Spring Creek is caused by the melting snow, and *it comes down in a series.* Spring Creek runs practically every year when there are good crops *and in dry seasons does not run at all.* In 1907, the water went down Spring Creek through a 24-foot breach, practically 4 feet deep. The channel, so-called, of the creek, is not regular, it being about 4 to 8 feet

at the bottom, the depth being irregular. (Page 25.) The witness, Mason, testified that he homesteaded the Wasson place in 1900, and owned it about ten years, and that the water at his place passed through the channel to the river (Yakima) at a maximum depth of two to two and one-half feet. On Page 26 the witness testified that the only time he knew water to run in Spring Creek was when the snow would come on the Rattlesnake Hills and melt and go off suddenly. "It would seem to absorb the water in the winter time when it went off gradually, but when the sun and wind melted it suddenly always had these freshets in the spring. The time of the melting depends entirely on the presence or absence of these Chinook winds. * * * I never saw it last that long as a rush of waters, but when this water run down there in the creek it would be a month or so until it all went away when plenty of snow in the mountains, but a rush of waters would be generally two, three, or four days."

The plaintiff Royer is then recalled, and proceeds to narrate conditions as they developed at the time of the damage complained of. (Page 27.) He states that on the 20th of January, 1916, there was from 12 to 16 inches of badly drifted snow, and Spring Creek and the ditches and canals up to the top of the hill were leveled across in many places, with the snow drifted into depressions; that the canyons are much deeper at the top of the hills, and these were full of snow; that the ground was frozen and the water could not go into the ground. The Chinook winds started at 11:30 January 20th, and stopped at night. The water was checked on the night of the 21st, but it came down on January 23rd and ran five hours. (Page 30.) Between January 23rd and February 7th about 15 inches of loose snow fell followed by freezing weather until the 7th of February. The

water was checked at night and flowed again in the daytime. The Creek is always dry in summer, above the Government's canal. "It is dry over *eleven months of the year, and sometimes it does not run that month. There must be snow in the hills to put water in that channel, by the Chinook winds. If it melts gradually, and no frost in the ground, you have no water in Spring Creek. If it melts off in the winter, melts gradually, it probably runs in warm weather The Chinook was what brought the water down.* The gully through which the water drained was practically drifted full of snow. After January 23rd, when the 15-inch snow storm came, a second Chinook wind came and the snow became more dense, until it finally became water in part, and started to flow down. *The snow that had not yet congealed would hold it back for a while until the water would break through* and it would come down in bunches, and the channel on the flat between the O.-W. R. & N. and Starkey's place would possibly have a tendency to fill up and cause the water to spread. *Spring Creek channel at my place was full of snow at that time and it had to work down gradually."*

DEFENDANT ENTITLED TO DIRECTED VERDICT.

If, with this undisputed testimony, we consider the laws of nature, we can see these hills heavily covered with snow, which suddenly yielded water and surged over a great area and in great volume with the coming of the winter cloudbursts—the Chinook winds. With a condition of that kind presented it is unreasonable to submit to a jury the question of whether or not an adequate culvert was built by the railroad company under its grade. It is equally unreasonable to permit them to assume that the so-called channel of Spring Creek, a few feet wide and a few feet deep, would accommodate this great rush of waters and melting snow. It is equally unreasonable to contend that these waters came upon the lower lands of these plaintiffs because they were impounded by railroad grade with a maximum height of 5 feet, tapering to nothing in a distance of a few hundred feet, and it seems to us equally unreasonable to contend that these waters were anything else than surface waters.

With this record counsel for the defendant interposed at the conclusion of the plaintiffs' case, the following motion:

> "We desire to move for a judgment of nonsuit in each of these cases upon the following grounds:
>
> "*First.* The water in question is shown by the evidence as surface water and is a common enemy. In respect to surface water I think the Federal Courts follow the rule adopted in the courts of the State where the alleged cause of action arises.
>
> "*Second.* The complaint in each of these cases is drawn upon the theory that actual damage resulted from the flow of surface water. Under these

circumstances, there is no legal liability and the complaint would not state facts sufficient to constitute a cause of action.

"*Third.* The channel called "Spring Creek" and by which it has been designated in the complaint, the evidence shows is nothing more or less than a mere drainage of surface water, resulting from melting snow or the action of Chinook winds operating thereon, and that such water may be defended against, may be dammed up, the channel may be closed or open in part and closed in part and that no actionable damage results, and that the evidence shows that the railroad bridge was built for the purpose of being used by the railroad and in accordance with good railroad building, and that if surface water of the type and kind shown by the evidence overflows, it becomes a cause of damages without injury."

(Page 35, Transcript)

At the conclusion of the taking of testimony, defendant applied to the Court to instruct the jury to return a verdict in favor of the defendant. (Page 61.)

Upon the authority of *Cass v. Dicks,* 14 Wash. 75, *Walker v. S. P. R. Co.,* 165 U. S. 593, *Wood v. Tacoma,* 66 Wash. 270, and *Johnson v. Chicago, St. Paul, etc., R. Co.,* 80 Wis. 641, the case should have been taken from the jury and a verdict directed in favor of the defendant. The Court, however, proceeded to instruct the jury that where the railroad crossed a natural water course the company was bound to construct a culvert or make other adequate provision to permit of the passage of the waters flowing down the stream at times of all ordinary freshets, and then presents the question, did the company, in the present instance, make adequate provision for the free passage of all water which might

ordinarily be expected to flow through the water course in question. If it did not, an injury resulted, and plaintiffs are entitled to a verdict.

It is therefore assumed, and in effect stated by the Court, that this was a natural water course, and the question is submitted to the jury as to whether or not the defendant should have made necessary provision to accommodate a volume of water that was moving en masse from several thousand acres of frozen area, down a precipitous hillside.

SUFFICIENCY OF EXCEPTIONS CHALLENGED.

The instructions in question were separately excepted to and appropriate requests for submission to the jury were timely presented, and yet counsel for plaintiffs challenge the sufficiency of the exceptions upon the theory that more than one proposition of law was involved and but a single exception taken. We are familiar with the rule announced in the cases cited by counsel, but fail to see their application to the record as presented in this case. The office of an exception is to challenge the correctness of the rulings or decisions of the trial court, promptly, when made, to the end that such rulings or decisions may be corrected by the court itself, if deemed erroneous, and to lay the foundation for their review, if necessary, by the appropriate appellate tribunal. 3 *Corpus Juris*, 895. There was certainly no misunderstanding in view of the objections made during the trial, and the very specific motion for a nonsuit presented by defendant's counsel. This record supports the assertion that the exceptions are sufficiently definite

and specific to point out clearly the rulings which are relied upon as erroneous. 3 *Corpus Juris* 900.

We respectfully submit that the judgment in these cases should be reversed and proper order made for the entry of a judgment in the lower court as against each of the plaintiffs, in favor of the defendant.

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